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Supreme Court, U.S.
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No. 04-1366

In The
Supreme Court of the United States

SANDY CALLERY,

Petitioner,

v.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK, J.B.'S RESTAURANTS, INC., J.B.'S FAMILY RESTAURANTS, INC., and STAR BUFFET, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARK O. MORRIS
SNELL & WILMER L.L.P.
15 W. South Temple
Suite 1200
Salt Lake City, UT 84101
(801) 257-1900

W. MARK GAVRE
Counsel of Record
PARSONS BEHLE & LATIMER
201 South Main Street
Suite 1800
Salt Lake City, UT 84111
(801) 532-1234

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the United States Court of Appeals for the Tenth Circuit properly found that Callery's claim for money damages was not available under ERISA § 502(a)(3), which provides only for "appropriate equitable relief."

CORPORATE DISCLOSURE STATEMENT

The United States Life Insurance Company in the City of New York is a member of the American General Insurance Companies, wholly owned by American International Group, Inc., traded on the New York Stock Exchange as "AIG." Star Buffet, Inc. has no corporate parent, and no publicly traded corporation owns 10% or more of its stock.

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STATEMENT OF THE CASE

This case rests on Callery's contention that she did not know that her spousal insurance coverage ended when she no longer had a spouse. The facts can be briefly summarized.

In 1994 Callery filled out an application for life insurance and selected "Life insurance for spouse." P. App. at 42a. The application form clearly states "Life insurance for spouse" and does not suggest that there is coverage for an ex-spouse. *Id.* After she divorced, Callery did not inform the insurance company of that fact. Instead, without notice to the insurance company, Callery continued to pay the insurance premium for spousal coverage. (The overpayment was subsequently returned to her.) Her stated reason for continuing insurance was to provide coverage of her ex-spouse's child support payment obligations, should he pass away. When her ex-spouse died, approximately two months before her youngest child turned 18 and thus would have ended further child support payments from her ex-spouse, Callery submitted a claim to the insurance company and was informed that she was not entitled to benefits.

On the above facts Callery sued, claiming that because she purportedly was not aware that the policy did not cover her ex-spouse, she did not obtain alternative insurance from another source:

> I was not aware that I could not maintain life insurance coverage on John . . . after our divorce. If I had known that I could not obtain any life insurance coverage on my ex-husband through my employment benefits once we divorced, I would

> have made arrangements to obtain insurance on John's life from some other source.

P. App. at 44a.

Callery claims to be entitled to $100,000 in "reliance damages." Her claim is based on ERISA § 502(a)(3), which provides only for "appropriate equitable relief." 29 U.S.C. § 1132(a)(3). Thus, the issue before this Court is whether the Tenth Circuit properly found Callery's claim for $100,000 in reliance damages was not a request for equitable relief.

Callery is not making a claim for plan benefits, and indeed admits that she is not entitled to benefits under the terms of the policy. P. App. at 12a, 44a. Instead, Callery is seeking money damages under the rubric of "equitable" relief. Her reason for construing her claim in this manner is obvious. This Court has unambiguously held (in *Mertens* and *Great-West*) that money damages or monetary relief is not available under ERISA § 502(a)(3). *See* Argument I below. Callery tries to get around the clear holdings of this Court by arguing that money damages should be deemed equitable relief when the defendant is a fiduciary. This argument was expressly rejected by this Court in both cases on the issue, *Mertens*[1] and *Great-West*.[2] *See* Argument I below.

Callery's only remaining claim is against her former employer, Star Buffet, Inc. The District Court dismissed Callery's claims against Star Buffet, after which Callery voluntarily dismissed her claims against the other defendants, including the insurance company, The United States Life Insurance Company in the City of New York.

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[1] *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993).

[2] *Great-West Life & Annuity v. Knudson*, 534 U.S. 204 (2002).

The Tenth Circuit affirmed the District Court's dismissal of Star Buffet.

SUMMARY OF ARGUMENT

Callery does not and cannot provide a compelling reason for granting a writ of certiorari. Specifically, Callery is incorrect in arguing that (a) the Tenth Circuit's *Callery* decision is in conflict with the relevant decisions of this Court (*Mertens* and *Great-West*), (b) the Tenth Circuit's decisions on the scope of equitable relief under ERISA § 502(a)(3) are inconsistent with each other, and (c) this Court's review of the Tenth Circuit's *Callery* decision would resolve a supposed "splintering" of ERISA opinions in other circuits (on different facts and concerning other issues).

The Tenth Circuit correctly found, based on this Court's *Mertens* and *Great-West* decisions, that Callery was seeking money damages that are not available under ERISA § 502(a)(3), which allows only for "appropriate equitable relief." In her argument to the Tenth Circuit and to this Court, Callery ignores or attempts to evade the clear holdings of *Mertens* and *Great-West*. These decisions hold that money damages, or monetary relief, are not available under ERISA § 502(a)(3) since only "appropriate equitable relief" is permitted. "Money damages are, of course, the classic form of *legal* relief." *Mertens v. Hewitt Associates*, 508 U.S. 248, 255 (1993) (emphasis in original). Callery argues that because she is suing plan fiduciaries, she is entitled to money damages. She labels them "equitable" relief. This Court has already rejected that argument, characterizing it as "a strange interpretation of 'equitable relief,'" which would require giving "a strained interpretation to § 502(a)(3)." *Id.* 508 U.S. at 261. Additionally, the fact that Callery's claim is

for reliance damages confirms that she is seeking legal, not equitable relief.

The Tenth Circuit's decision in this case is not inconsistent with *Administrative Committee of the Wal-Mart Assoc. Health and Welfare Plan v. Willard*, 393 F.3d 1119 (10th Cir. 2004), as claimed by Callery. *Willard* does not permit the recovery of monetary relief under ERISA § 502(a)(3). Contrary to Callery's characterization, the Tenth Circuit there merely held that the equitable remedy of restitution is available under ERISA § 502(a)(3) in appropriate circumstances as indicated by *Great-West*. *Callery* and *Willard* are not inconsistent with each other, and moreover deal with very different issues in different contexts.

Finally, given that the Tenth Circuit's decision in this case is a straightforward application of *Mertens* and *Great-West* and concerns only Callery's claim for reliance damages, review of the decision by this Court would not facilitate resolution of what Callery calls a "mishmash of rulings" in other circuits, in cases concerning issues and facts quite different from those present here.

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISIONS.

Callery claims that the Tenth Circuit's decision "conflicts with *Great-West* and denies relief typically available in equity." Pet. at 10. There is no conflict. The Tenth Circuit's decision strictly follows this Court's *Mertens* and *Great-West* decisions.

In *Mertens*, a group of former employees sued the fiduciaries of a failed retirement plan for breach of fiduciary duty and also sued "a nonfiduciary that knowingly

participated in the plan fiduciaries' breach of their fiduciary duties." 508 U.S. at 250-51. In their claim against the nonfiduciary under § 502(a)(3), the plaintiffs sought monetary relief, which they attempted to characterize as equitable relief. 508 U.S. at 255. Like Callery here, the *Mertens* plaintiffs invoked "the common law of trusts" to argue that because monetary relief was available in equity courts in trust actions, equitable relief under § 502(a)(3) should be expanded to include monetary relief or money damages. This Court rejected that argument, holding that only strictly equitable relief, "such as injunction, mandamus, and restitution, but not compensatory damages," is available under § 502(a)(3). 508 U.S. at 255-56.

In reaching its decision, this Court acknowledged that under trust law courts of equity traditionally could provide monetary relief:

> It is true that, at common law, the courts of equity had exclusive jurisdiction over virtually all actions by beneficiaries for breach of trust. . . . It is also true that money damages were available in those courts against the trustee, . . . and against third persons who knowingly participated in the trustee's breach.

508 U.S. at 256 (citations omitted). The foregoing facts were not dispositive, this Court explained, because in the context of "enforcement of a trust," an equity court historically was empowered to "establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority." *Id.* (citation omitted). A court of equity thus could provide monetary relief against a trustee, but only because the court had the power to grant a purely legal remedy in that context.

Hence, in determining what equitable relief is available under § 502(a)(3), this Court emphasized that one cannot merely invoke the remedial powers of equity courts over trustees. Such an approach would render the term "equitable relief" meaningless because it would include legal relief as well.

> Since *all* relief for breach of trust could be obtained from a court of equity, limiting the sort of relief obtainable under § 502(a)(3) to "equitable relief" in the sense of "whatever relief a common-law court of equity could provide in such a case" would limit the relief *not at all*. We will not read the statute to render the modifier superfluous. . . . Regarding "equitable" relief in § 502(a)(3) to mean "all relief available for breach of trust at common law" would also require us either to give the term a different meaning there than it bears elsewhere in ERISA, or to deprive of all meaning the distinction Congress drew between "equitable" and "remedial" relief in § 409(a), and between "equitable" and "legal" relief in the very same section of ERISA. . . . Neither option is acceptable.

508 U.S. at 257-59 (emphasis in original; citations omitted). The relief Callery seeks here remains unacceptable.

Mertens thus holds that only those categories of relief that were typically available in equity, "such as injunction, mandamus, and restitution, but not compensatory damages," are available under § 502(a)(3). 508 U.S. at 256. In contrast, money damages or monetary relief was legal relief, and hence is not available under § 502(a)(3):

> [M]onetary relief for all losses . . . sustained as a result of [an] alleged breach of fiduciary duties. . . . [was] the classic form of *legal* relief.

508 U.S. at 255 (emphasis in original).

In *Great-West*, this Court reaffirmed that only strictly equitable relief is available under § 502(a)(3), and again rejected the argument that monetary relief could be deemed equitable because courts of equity were empowered to grant such a remedy.

> Thus, in *Mertens* we rejected a reading of the statute that would extend the relief obtainable under § 502(a)(3) to whatever relief a court of equity is empowered to provide in the particular case at issue (which could include legal remedies that would otherwise be beyond the scope of the equity court's authority). Such a reading, we said, would "limit the relief *not at all*" and "render the modifier ['equitable'] superfluous."

Great-West Life & Annuity v. Knudson, 534 U.S. 204, 210 (2002) (emphasis and bracket in original). Thus this Court unambiguously held that monetary relief, regardless of how it is labeled, is legal relief and is therefore not obtainable under § 502(a)(3).

> Almost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty.

534 U.S. at 210 (citation omitted).

Despite the efforts of the plaintiffs in *Great-West* to characterize their claim as equitable, this Court rejected their arguments and reiterated that whenever a plaintiff seeks "to impose personal liability" on a defendant for a "loss resulting from the defendant's breach of legal duty," the remedy sought is a legal one and is not available under § 502(a)(3). 534 U.S. at 210-12.

This Court further explained that while "restitution" is generally viewed as an equitable remedy, only true "restitution in equity" is available under § 502(a)(3).

> However, not all relief falling under the rubric of restitution is available in equity. . . . [W]hether [restitution] is legal or equitable depends on the basis for [the plaintiff's] claim and the nature of the underlying remedies sought. . . . In cases in which the plaintiff could *not* assert title or right to possession of *particular property*, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him, the plaintiff had a right to restitution at law. . . . In such cases, the plaintiff's claim was considered legal because he sought to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money.

534 U.S. at 212-13 (citations omitted; second emphasis added).

Only where the plaintiff seeks to recover a particular *res* in the defendant's possession, as opposed to compensation for a loss suffered due to the defendant's conduct, is the plaintiff truly seeking an equitable remedy.

> In contrast, a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive

> trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. . . . Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.

534 U.S. at 213-14 (emphasis in original).

For Callery to make out a claim for equitable relief, she was and is required to show that Star Buffet received from her a payment which it has unjustly retained and which in good conscience it must "restore" to Callery. *Id.* Callery has no such claim. The insurance premium overpayment was long ago returned to her by the insurance company. Pet. at 3. Star Buffet has no "particular property" belonging to Callery, nor does she claim it does. Callery is merely attempting "to impose personal liability" on Star Buffet for money damages as "compensation for loss resulting from [Star Buffet's alleged] breach of legal duty." 534 U.S. at 210. In other words, Callery asks this Court to provide her with something the policy she purchased was never intended to give to her. Both *Mertens* and *Great-West* make clear that the monetary relief Callery seeks is not available under § 502(a)(3).

Callery also argues that the Tenth Circuit erred in purportedly ignoring *Varity Corp. v. Howe*, 516 U.S. 489 (1996). Pet. at 13. It did not. Rather, the Tenth Circuit found Callery's attempt to invoke *Varity* as a basis for her claim for monetary relief to be meritless. P. App. at 12a. *Varity* did not allow recovery of monetary relief. Indeed, at the appellate level, the Eighth Circuit stripped out all

monetary damages rendered by the jury. *Howe v. Varity Corp.*, 36 F.3d 746, 756-57 (8th Cir. 1994). *See also McLeod v. Oregon Lithoprint Inc.*, 102 F.3d 376, 379 (9th Cir. 1996) ("The *Varity* opinion does not alter the holding in *Mertens* that compensatory damages are unavailable under § 502(a)(3).").

The remedy in *Varity,* as Callery admits, merely involved the reinstatement of the plaintiffs to their prior benefit plan (from which they had been fraudulently induced to leave). Pet. at 13. The equitable nature of the relief had been conceded in the court below, and was not before this Court. P. App. at 12a. Finally, *Varity* has no bearing on Callery's case for two additional reasons, as pointed out by the Tenth Circuit. First, unlike the plaintiffs in *Varity*, Callery does not seek reinstatement to the plan. Second, even if she were reinstated, she could not obtain any recovery because, as Callery admits, the terms of the insurance policy exclude coverage of former spouses. P. App. at 12a.

That Callery is seeking legal (not equitable) relief is clear also from the fact that her claim is one for reliance damages. She is not seeking plan benefits, to have plan terms enforced, or to be reinstated to the plan. She is not pursuing a claim against the insurance company whose policy expressly advised her that there was no coverage for former spouses. Rather, Callery is seeking $100,000 from her employer that she claims she should have received from a policy she neither purchased nor paid for – a hypothetical insurance policy she claims she would have obtained had she known that "Life insurance for spouse" meant exactly what it said. The Tenth Circuit observed: "Ms. Callery's claim might be most accurately construed as one for reliance damages, because she claims that the lack

of notice prevented her from obtaining life insurance on her former husband from another source." P. App. at 10a-11a. Reliance damages are compensatory (legal) relief, not equitable. *See Caffey v. UNUM Life Ins. Co.*, 302 F.3d 576, 583 (6th Cir. 2002) (dismissing § 502(a)(3) claim for value of other insurance benefits that plaintiff did not obtain due to fiduciary's alleged breach of fiduciary duty because relief sought not equitable); Dan B. Dobbs, *Law of Remedies* (2d Ed. 1993) § 12.3(1) at 50-53 (reliance damages are compensable, legal relief).

For the foregoing reasons, it remains apparent that the Tenth Circuit properly affirmed the dismissal of Callery's claim against Star Buffet on the ground that she was seeking legal, not equitable relief. It is also clear that the Tenth Circuit's decision is consistent with and properly applies this Court's *Mertens*, *Great-West* and *Varity* decisions.[3]

II. THE TENTH CIRCUIT'S DECISIONS ON EQUITABLE RELIEF UNDER ERISA § 502(a)(3) ARE CONSISTENT.

Callery claims that the Tenth Circuit's *Callery* decision is inconsistent with its *Willard* decision, which according to Callery, permitted the recovery of "monetary relief" under § 502(a)(3). Pet. at 7. Callery grossly mischaracterizes the *Willard* decision. The facts of *Willard* are like those of *Great-West,* in that the benefit plan sought

[3] Callery also refers to *Aetna Health Inc. v. Davila*, 542 U.S. 200, 124 S. Ct. 2488 (2004). Pet. at 9. However, the *Davila* court pointed out that the plaintiff had "chosen not to pursue any ERISA claim, including any claim arising under ERISA § 502(a)(3)." 124 S. Ct. at 2502 n.7.

reimbursement from a participant (for medical expenses paid on his behalf) based on his recovery in a personal injury settlement, in accordance with the terms of the plan. *Willard*, 393 F.3d at 1120. Based on an agreement with the participant (Willard), the portion of the settlement covering the medical expenses at issue was deposited in the court, pending the court's decision on the plan's claim to be reimbursed. Because the participant agreed to have the funds at issue withheld from the settlement distribution and to be deposited in the court, he exercised control over and had constructive possession of the funds. *Id.*, 393 F.3d at 1125.

The Tenth Circuit strictly applied the *Great-West* standard for equitable relief under § 502(a)(3):

> [I]n *Great-West*, the Court elaborated on the distinction between "legal" and "equitable" relief, stating that "a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." On the other hand, reasoned the Court, if "the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] is only that of a general creditor, and the plaintiff cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant]."

Willard, 393 F.3d at 1121 (quoting *Great-West*, 534 U.S. at 213-14). Here, of course, there are no "identified" monies to be segregated or captured. There are only hypothetical funds arising from a hypothetical policy.

Because the recovery from the third party had not been dissipated, but was specifically identifiable and had been deposited in the court at the direction of the participant, the *Willard* court determined that the plan was "entitled to restitution in the form of an equitable lien as 'appropriate equitable relief' under § 502(a)(3)." *Id.*, 393 F.3d at 1125. Contrary to Callery's mischaracterization, *Willard* did not grant monetary relief let alone "give[e] fiduciaries greater rights to monetary relief . . . than beneficiaries." Pet. at 8.

In sum, there is no inconsistency between the Tenth Circuit's *Callery* and *Willard* decisions. Both decisions properly and strictly apply the standards articulated by this Court in *Mertens* and *Great-West*. Again, Callery's argument is without merit and provides no reason for granting a writ of certiorari.

III. REVIEW OF THE *CALLERY* DECISION WOULD HAVE NO BEARING ON OTHER ERISA CASES.

Callery argues that ERISA decisions in other circuits concerning equitable relief are "in disarray" and that granting her Petition would somehow resolve the issues in those other cases. Pet. at 5, 8-9. There is no merit to Callery's argument for multiple reasons.

First, Callery mischaracterizes the cases she cites in order to create the supposed "disarray." Specifically, and consistent with her objectives here, Callery blurs the distinction between legal and equitable relief – using phrases like "monetary relief in the form of equitable restitution" – in order to contentiously mischaracterize the holdings in the cases she cites. Pet. at 7, 8.

Second, the Tenth Circuit properly decided the *Callery* case based on a straightforward application of *Mertens* and *Great-West*. Consequently, a review of the *Callery* decision by this Court would not only be unnecessary and superfluous, but would also not affect other cases supposedly dealing with other, purportedly unresolved issues.

Third, because *Callery* is a factually peculiar case, any review by this Court would be limited to its facts and would not address the issues in other cases in other factual settings. The instant case is distinctive in that Callery does not seek plan benefits, does not seek to enforce the terms of any plan, does not seek to reform a plan, and does not seek to be reinstated to any plan. Callery is also not seeking any relief from the insurance company that provided the policy, but only from her employer. Instead, she seeks reliance damages unrelated to the plan, plan benefits or plan terms. She wants the equivalent of insurance benefits from a hypothetical insurance policy – "some other source" – that she claims she would have purchased had she purportedly been better informed about her actual plan coverage. Pet. at 3. None of the other cases cited by Callery (Pet. at 8, 9) concern issues or facts remotely similar to those in the instant case.

The case of *Matthews v. Chevron Corp.*, 362 F.3d 1172, 1185-86 (9th Cir. 2004) concerns employees who took retirement instead of being laid off with enhanced benefits because they were misinformed about the terms of the benefit plan. Finding that there had been a breach of fiduciary duty based on the misinformation given to the plaintiffs, the court granted injunctive relief instating the plaintiffs into the severance plan as a form of "appropriate equitable relief" under § 502(a)(3). The plaintiffs did not

"recover monetary relief" as Callery claims. Pet. at 8. Nothing in the facts or the issues of *Matthews* would be illuminated by a review of the *Callery* decision.

The cases of *Westaff (USA), Inc. v. Arce*, 298 F.3d 1164 (9th Cir. 2002) and *QualChoice, Inc. v. Rowland*, 367 F.3d 638 (6th Cir. 2004), *cert. den.*, 125 S. Ct. 1639 (2005), both concern cases in which the plan administrator attempted to enforce a plan term (subrogation/reimbursement) against a plan participant. The courts found that because the plaintiffs were seeking compensatory damages for breach of contract, their claims for legal relief were not cognizable under § 502(a)(3), which provides only for "appropriate equitable relief." These cases, involving the enforcement of plan terms in contract-type actions, are completely unlike the facts of *Callery* and could not be affected in any way by a review of the *Callery* decision.

The case of *Skretvedt v. E.I. DuPont de Nemours*, 372 F.3d 193 (3rd Cir. 2004) concerns the payment of interest on plan benefits that were delayed but ultimately paid, either voluntarily or pursuant to a court order. Since *Callery* does not concern plan benefits or interest on delayed payment of benefits, review of the case would have no bearing on *Skretvedt*. In *Gerosa v. Savasta & Co., Inc.*, 329 F.3d 317, 319, 322 (2nd Cir. 2003), a § 502(a)(3) claim by plan trustees against an actuary, based on his alleged negligence causing the plan to be underfunded, was considered. The court ruled that while equitable relief such as restitution was available, consequential damages (legal relief) were not. There is nothing problematic about the *Gerosa* decision, and its facts and issues are completely unlike those of *Callery*.

Callery claims that the Eighth Circuit has issued inconsistent decisions. Pet. at 9. The court in *Parke v. First Reliance Standard Life Ins. Co.*, 368 F.3d 999, 1008 (8th Cir. 2004) upheld the award of interest on wrongfully delayed benefits on the ground that it was a "disgorge[ment] of profits" gained by the fiduciary through its misconduct. The case of *Calhoon v. Trans World Airlines, Inc.*, 400 F.3d 593, 595, 598 (8th Cir. 2005) concerns a claim for damages brought by a former participant against the administrator of a (terminated) COBRA program for having canceled his COBRA coverage after he failed to pay the monthly premium. Because the plaintiff did not seek equitable relief but only money damages, the court upheld the dismissal of his claim under § 502(a)(3). In doing so, the Eighth Circuit discussed and distinguished its *Parke* decision, explaining that while the principle of unjust enrichment allowed for an equitable remedy in *Parke*, the claim for money damages in *Calhoon* was a legal claim not permitted by § 502(a)(3). These two Eighth Circuit decisions are not inconsistent, as claimed by Callery. Further, there is no similarity between the facts and issues of *Parke* or *Calhoon* and *Callery*.

Finally, Callery refers to two pre-*Great-West* decisions, *Strom v. Goldman Sachs & Co.*, 202 F.3d 138 (2nd Cir. 1999), and *Bowerman v. Wal-Mart Stores Inc.*, 226 F.3d 574 (7th Cir. 2000). These pre-*Great-West* cases are no longer good law, and review of the *Callery* decision would have no bearing on them. *See* P. App. at 16a and *Calhoon*, 400 F.3d at 598.

In sum, Callery's reference to other cases in other circuits provides no basis for her Petition.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

MARK O. MORRIS
SNELL & WILMER L.L.P.
15 W. South Temple
Suite 1200
Salt Lake City, UT 84101
(801) 257-1900

W. MARK GAVRE
Counsel of Record
PARSONS BEHLE & LATIMER
201 South Main Street
Suite 1800
Salt Lake City, UT 84111
(801) 532-1234

June 13, 2005